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No. 89-1284

In The

Supreme Court of the United States

October Term, 1989

FOWLER INDUSTRIES, INC.,
FOWLER ELECTRIC CO., INC.,
STEVE FOWLER ELECTRICAL CONTRACTORS, INC.,
CLARK ELECTRICAL CONTRACTORS, INC.,
and SAMUEL LEWIS FOWLER, JR., Individually,

Petitioners,

vs.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 613,

Respondent.

On Petition For A Writ Of Certiorari To
The United States Court Of Appeals
For The Eleventh Circuit

BRIEF OF RESPONDENT INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 613, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Did the Eleventh Circuit correctly decide that an "appropriate unit" determination is not a prerequisite to a union's action to enforce the economic terms of a prehire agreement against entities alleged to be a single employer or alter ego?

Did the Eleventh Circuit correctly decide that federal courts have jurisdiction to enforce the economic terms of a prehire agreement against entities alleged to be a single employer or alter ego?

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BRIEF OF RESPONDENT INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 613, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent International Brotherhood of Electrical Workers, Local 613 (hereafter "the Union") respectfully prays that the Court deny Petitioners' request for the issuance of a Writ of Certiorari to review the Judgment

and Opinion of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on September 25, 1989.

STATUTES INVOLVED

In addition to those statutes listed in Petitioners' Brief, the Union submits that the following statutes are also involved in this Petition: (1) National Labor Relations Act, Section 8(a)(5), 29 U.S.C. Section 158(a)(5) (hereafter Section 8(a)(5)); (2) National Labor Relations Act, Section 8(f), 29 U.S.C. Section 158(f) (hereafter Section 8(f)); and, (3) National Labor Relations Act, Section 9(a), 29 U.S.C. Section 159(a) (hereafter Section 9(a)). These sections are set forth verbatim in Appendix A.

STATEMENT OF THE CASE

As to Petitioners' Statement of the Case, the Union notes no inaccuracies or omissions regarding the proceedings below and, therefore, will not repeat the procedural history of this case.

However, consistent with their position in the Eleventh Circuit. Petitioners make no statement with regard to the underlying facts. Inasmuch as review of a dismissal for lack of subject matter jurisdiction is *de novo, Plumbers and Pipefitters Local Union 72 v. John Payne Co.*, 850 F.2d 1535, 1537 (11th Cir. 1988) (citations omitted) and *de novo* review requires that a court take a favorable view of the

facts alleged to support jurisdiction, *Whittington v. Whittington*, 733 F.2d 620 (9th Cir. 1984); *see also A. Cherney Disposal Co. v. Chicago & Suburban Refuse Disposal Association*, 484 F.2d 751, 759-760 (7th Cir. 1973); *cert. denied*, 414 U.S. 1131, *reh'g denied*, 419 U.S. 887 (1974); *Laborers Health and Welfare Trust Fund for Northern California v. Advanced Lightweight Concrete Company*, 779 F.2d 497, 499 (9th Cir. 1985) *aff'd on other grounds*, 56 U.S.L.W. 4156 (1988), a brief review of the underlying allegations and supporting facts is warranted.

The following statement of facts is relevant to show that, contrary to Petitioner's contentions, the Union's action herein is a genuine breach of contract action pursuant to Section 301 of the Labor Management Relations Act, 29 U.S.C. Section 185(a) (1982), (hereafter Section 301) and is not an attempt to circumvent the representation procedures of the National Labor Relations Board. Furthermore, the facts will demonstrate (1) the absence of any need to make a bargaining unit determination involving employees rights under 29 U.S.C. Section 157 (1982) (hereafter "Section 7 rights"); and, (2) the policy considerations warranting the exercise of federal court jurisdiction over labor law issues which may emerge in a breach of contract action.

I. STATEMENT OF FACTS

Samuel Lewis Fowler has for many years owned and operated Fowler Electric Co., Inc.[1] FEC has been a Union

[1] Hereafter Petitioners will be referred to as: S.L. Fowler (Samuel Lewis Fowler); FEC (Fowler Electric Co., Inc.); SFE

(Continued on following page)

shop since 1962 when S.L. Fowler first executed a prehire agreement with the Union. Thereafter, S.L. Fowler and the Union executed successive prehire agreements, the most recent of which was in effect at the time this action was filed.

For over twenty years the union supplied FEC with skilled journeymen electricians and apprentices trained in the union's apprenticeship training program. (R-3-67, Bexley Aff. para. 3; Deposition of S.L. Fowler (hereafter "Fowler Dep.") at 47-48). (This deposition was not assigned a record reference number.)[2] During the entire period from 1962 through the present FEC paid its employees wages and benefits fixed by the union contract.

In April, 1983, S.L. Fowler created two new corporate entities, FI and SFE (R-3-67, Fowler Dep. at 100-101, 107-110), operated ostensibly by his sons, Steve and Derrick. (Fowler Dep. at 100-101, 132). As one of the FEC employees put it, "Mr. (Samuel) Fowler came to my office one day, said he decided to open a nonunion firm and wanted to move me down there with Steve and Derrick Fowler and help get the thing kicked off." (R-3-67, Deposition of Al Whitmire at 20).

S.L. Fowler established his nonunion subcontracting businesses by a series of intricate corporate transactio ; designed to create a fictional separation between the

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(Continued from previous page)

(Steve Fowler Electrical Contractors, Inc.); CEC (Clark Electrical Contractors, Inc.); FI (Fowler Industries, Inc.) or collectively as Petitioners.

[2] References to the record are cited as "R ___", while "App. ___" denotes citations to the Appendix to the Petition for a Writ of Certiorari.

union and nonunion enterprises where none existed in fact.

FEC and SFE are electrical subcontractors. FI was created to serve as a holding company for FEC, SFE, and later for CEC. (R-3-67, Fowler Dep. at 114).[3] FI became the sole stockholder of both FEC and SFE (Fowler Dep. at 129, 133),[4] although since S.L. Fowler owns all stock of FI, the creation of the holding company did not alter his complete ownership and control of his growing business empire. As the sole stockholder of FI, S.L. Fowler is solely responsible for naming the board of directors of the three corporations. (Fowler Dep. at 148-150). Not surprisingly, FI and FEC have had identical officers and directors since 1983 and S.L. Fowler's son Derrick has served, at his father's behest, as an officer of both SFE and FI. (Fowler Dep. at 130-134).

When S.L. Fowler created FI and SFE, he transferred *all* the tools, equipment and vehicles owned by his union business to the holding company. (Fowler Dep. at 259). Moreover, he created identical administrative service agreements under which FI provided both SFE and FEC with the following services: bookkeeping, accounting, data processing, payroll, billing, invoicing and treasury and insurance advice. (Fowler Dep. at 243-253, Exhibits

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[3] CEC was created in July, 1983 (Fowler Dep. at 100-101, 107-110, Exhibit 13) and is also in the electrical subcontracting business as an alleged "minority" contractor (Fowler Dep. at 197-198).

[4] As to CEC, FI owns forty-nine percent of the stock, and Clark, a black individual, owns fifty-one percent.

25-27). These services are provided by the same individuals. There were no arm's length negotiations surrounding the execution of the service agreements. As S.L. Fowler admitted, "That's the way (the agreement) was presented to them, and they executed it". (Fowler Dep. at 255).[5]

Since their inception the new corporations have operated out of the same building as FEC and used FEC's legal and accounting advisors. In the same building are the records, inventory, tools and equipment of all four corporations. (Fowler Dep. at 152, 225-233). In fact, for some period of time, SFE and CEC even shared the same office. (Fowler Dep. at 234). FEC, SFE and FI file consolidated tax returns, and money is advanced between the corporations on an as needed basis. (Fowler Dep. at 505). Loans among the companies are not memorialized by formal loan agreements. (Fowler Dep. at 113-14, 502-07).

In 1983, twenty-three former employees of FEC were transferred to FI or SFE in such positions as engineer, estimator, project manager, journeymen electrician, warehouse and clerical help. (Fowler Dep. at 278-360). While S.L. Fowler testified that employees who transferred from the union shop to one of the new corporations "quit" working at FEC before applying for employment at SFE, his statement was contradicted by Al Whitmire. (Whitmire Dep. p. 20).

S.L. Fowler admits that some of his former customers at FEC are now customers of his nonunion business and

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[5] In September, 1983, CEC executed the same agreement (Fowler Dep. at Exhibit 26).

documents provided by Petitioners during discovery revealed further instances in which customers of FEC have become customers of SFE. (Fowler Dep. 485-503).

S.L. Fowler claims that he is not involved in the day to day operation of SFE, particularly with regard to labor matters. (Fowler Dep. at 157-58). However, at the time he appointed his sons to their positions with SFE their only electrical experience was as apprentice electricians (Fowler Dep. at 62, 81-82) and they had no experience whatsoever running an electrical contracting business. (Fowler Dep. at 188-89). Yet within two years of opening, SFE was grossing millions of dollars.

As to CEC, while it is labeled a minority business, because Clark owns fifty-one percent of the stock, S.L. Fowler retains effective control of operations. For example, Clark can issue no check on the corporate account without the countersignature of a Fowler family member. (Fowler Dep. at 194-195). Nor can Clark bid on projects in excess of $25,000.00 without S.L. Fowler's approval (Fowler Dep. at 196), although Clark, unlike Steve and Derrick Fowler, has over twenty years' experience in the electrical subcontracting industry. (Fowler Dep. at 105).

In 1983, FEC reported an average of seventy-six employees per month to the union's various fringe benefit funds and an average of 12,500 man hours worked per month. By 1986, however, these figures had dwindled to an average of forty-nine employees per month and an average of 8,400 man hours worked per month. Never before has there been such a decline for four straight years, and with limited exceptions the 1986 figures are

the lowest in the past ten years. (R-3-67, Bexley Aff. para. 6).

REASONS FOR DENYING THE WRIT

I. SUMMARY OF ARGUMENT

By its suit the Union did not seek to become the exclusive bargaining representative for Petitioners' employees such that Petitioners would be obligated to bargain with the Union upon the expiration of the contract. Nor did the Union seek a ruling that the prehire contract had matured into a Section 9(a) collective bargaining agreement such that it would bar Petitioners' employees from petitioning for an election at any time and rejecting the contract. Rather, the Union sought enforcement of its prehire contract with a single employer which, having executed and taken the benefits of the prehire contract for over twenty years, subdivided itself for the purpose of avoiding its contractual obligations.

The issues raised by this action do not implicate the representational rights of employees under Section 7 of the National Labor Relations Act (hereafter the NLRA) and, as such, an appropriate unit determination is not required. Such a determination is only required under Sections 9(a) and (b) of the NLRA to insure that employees are appropriately grouped together for the purpose of collective bargaining through their exclusive bargaining representative. Since no employee representational rights are involved, the decision below is correct and not in conflict with opinions of this Court nor with decisions from other circuit courts on the same matter.

II. ARGUMENT

Section 8(f) of the NLRA specifically permits unions and employers in the construction industry to negotiate and execute contracts before the union achieves majority support amongst the employers' employees. This Court has held that such prehire agreements are enforceable under Section 301 regardless of the union's majority status in an appropriate unit. *Jim McNeff v. Todd*, 461 U.S. 260, 271-272 (1983). In such an action, the Section 7 rights of employees are not implicated and a unit determination is unnecessary. As this Court recognized in *Jim McNeff:*

> There is a critical distinction between an employer's obligation under the [National Labor Relations] Act to bargain with the representative of the majority of its employees and its duty to satisfy lawful contractual obligations that accrued after it enters a prehire contract. *Id* at 267.
>
> Union enforcement, by way of a Section 301(a) suit, of monetary obligations incurred by an employer under a prehire contract prior to its repudiation does not impair the right of employees to select their own bargaining agent . . . [E]nforcement of accrued obligations in a Section 301 suit does not mean that the union represents a majority of the employer's employees. In a Section 301 suit, the District Court merely enforces a contract entered into by the employer – a contract that Congress has legitimated to meet a special situation even though employees themselves have no part in its negotiation or execution. Such enforcement does not grant the plaintiff union a right otherwise enjoyed only by a majority union except in the very narrow sense, expressly intended by Congress, that employers and minority union in the construction industry do not violate the Act by entering into prehire agreements. There is no

> sense in which respondent's contract action has a recognitional purpose . . . *Id* at 269.

As the Eleventh Circuit correctly recognized herein, the Union does not claim to be the bargaining representative for Petitioners' employees and does not claim a right to compel Petitioners to negotiate or to execute a new prehire agreement: "Instead, the Union seeks only a determination that the four corporate [Petitioners] are in fact a single employer that has breached a valid prehire agreement". (App. A, p. 9a-10a). Assuming the validity of this claim (as must be done at this stage of the proceedings) the court below correctly noted that the (electrician) employees of SFE and CEC already are covered by the prehire agreement and no unit determination is necessary.

As shown hereafter, this holding is not in conflict with other circuits *on the same matter* nor is it in conflict with any opinion from this court.

A. The Decision Below Is Not In Conflict with Another Court of Appeals On The Same Matter

The thrust of Petitioners' argument is that the Ninth Circuit's decision in *Brotherhood of Teamsters, Local 70 v. California Consolidators*, 693 F.2d 81 (9th Cir. 1982), *cert. denied*, 469 U.S. 887, *reh'g denied*, 469 U.S. 1066 (1984) and the Fifth Circuit's decision in *Carpenters Local 1846 v. Pratt Farnsworth*, 690 F.2d 489 (5th Cir. 1982), *cert. denied*, 464 U.S. 932 (1983), stand for the proposition that *all* cases involving single employer/alter ego claims require an appropriate unit determination and, as such, the decision below is in conflict with these opinions. This argument

however, ignores critical distinctions between these decisions and the instant case which, when laid bare, reveal the absence of any conflict between the circuits on the same matter.

In *California Consolidators* the Ninth Circuit noted, in the very first sentence of its *per curiam* opinion, that "Local 70 wants to represent the employees of California Consolidators, Inc." *Id* at 81. In order to prevail on that claim, it was essential for Teamsters Local 70 to establish majority support in an appropriate unit and, as such, the court would be required to make a unit determination.[6] In the instant case however, no such claim is raised and the Eleventh Circuit's finding that a unit determination was not required does not conflict with the Ninth Circuit on the same matter.

The foregoing claim is buttressed by the fact that *California Consolidators* did not involve construction industry employers, prehire agreements, nor the unique provisions of Section 8(f) of the NLRA. Rather, it involved a traditional Section 9(a) collective bargaining contract and an exclusive bargaining agent which sought to extend its exclusive bargaining rights *and* its contract to a new group of employees. The Section 7 rights of these employees obviously were implicated by that claim and,

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[6] Petitioners claim that federal courts lack jurisdiction to decide such issues, and that such is the law in the Ninth Circuit, will be discussed hereafter.

as a result, a bargaining unit determination was required.[7]

Petitioners further assert that the opinion below is in conflict with the Fifth Circuit's opinion in *Pratt Farnsworth*. In *Pratt Farnsworth* the Fifth Circuit specifically adopted the National Labor Relation Board's two step analysis in single employer/alter ego cases, the second step of which requires an appropriate unit determination.[8] Thus, in *Pratt Farnsworth* the Fifth Circuit held that in an action to enforce a contract against alleged single employers (even in the construction industry) a unit determination was required. The court went on to hold that federal courts had jurisdiction to decide that issue.

However, at the time the Fifth Circuit decided *Pratt Farnsworth*, the law in that Circuit was that a Section 8(f)

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[7] The same is true with regard to the Ninth Circuit's opinion in *Local 3-193 International Woodworkers of America v. Ketchikan Pulp Company*, 611 F.2d 1295 (9th Cir. 1980, in which the union sought to extend its bargaining rights and contract to non-construction industry employees *solely* on the basis of certain contractual (accretion) provisions.

[8] Petitioners' assertion that "the Eleventh Circuit recognized" that a Section 301 breach of contract case against alleged single employers "*must*" be resolved in accordance with the two step analysis "established by the Board" is flawed. (Pet. Brief, p. 6). First, nowhere in the Eleventh Circuit's opinion is this broad proposition recognized. Second, this statement blends single employer cases as though there is no distinction between enforcement of Section 8(f) contracts and Section 9(a) contracts. Finally, it ignores the different remedies available through a Labor Board single employer case, i.e., bargaining orders, and a breach of contract case, i.e., enforcement of economic terms of a contract.

prehire agreement could not be enforced absent proof of majority status in an appropriate unit. *Baton Rouge Building and Construction Trades Council v. E.C. Shafer Construction Co.*, 657 F.2d 806 (5th Cir. 1981). By requiring a unit determination in a single employer suit on a prehire contract, the *Pratt Farnsworth* panel was bound by the law of the Circuit "that prehire agreements become fully enforceable collective bargaining agreements *only* upon a demonstration of majority status in the appropriate bargaining unit". *Pratt Farnsworth* at 522 (emphasis added). Such a showing, however, would also make the union the exclusive bargaining representative for all employees in that unit with all the attendant rights and privileges. Since employees would be saddled with an exclusive bargaining representative, their Section 7 rights were implicated and an inquiry into the community of interests among those employees (i.e., a unit determination) was essential. Applying the Board's two step analysis (with the unit finding requirement) was required by the then applicable law in the Fifth Circuit and was consistent with the remedies applicable in a Labor Board case.[9]

Since *Pratt Farnsworth* was decided, this Court implicitly overruled *Baton Rouge* in *Jim McNeff*, at 265, n.6, and held that "monetary obligations assumed by an employer under a prehire contract may be recovered in a

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[9] As the court below recognized, "each of the cases principally relied upon by the *Pratt Farnsworth* panel . . . involved a union's claim to be the *collective bargaining representative* of the employees of the non-signatory subentity of a single employer signatory to a prehire agreement". (App. A. p. 11a, N.4) (citations omitted) (emphasis in original).

Section 301 action brought by a union prior to repudiation of the contract even though the union has not attained majority support in the relevant unit". *Id* at 271-72.

While the court below did recognize that its holding is "directly contrary" to the Fifth Circuit's decision in *Pratt Farnsworth* (App. A, p. 11a, n.4), it is respectfully submitted that in light of this Court's decision in *Jim McNeff*, the conflict between the circuits is not *on the same matter*. Thus, at the time *Pratt Farnsworth* was decided, the Fifth Circuit recognized no distinction between enforcement of a prehire contract and enforcement of a Section 9(a) contract in a single employer case. In either situation, majority status in an appropriate unit was required. Since majority status would establish the union as an exclusive bargaining agent, a unit determination was essential to protect employees' Section 7 rights. At the time the instant case was decided, however, majority status in an appropriate unit was *not* a prerequisite to contract enforcement and, as a result, a unit finding was not required. Thus, it is respectfully submitted that the decision below is not in conflict with the Fifth Circuit's decision in *Pratt Farnsworth* on the same matter.[10]

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[10] Similarly, there is no conflict between the decision below and *Florida Marble Polishers Health & Welfare Trust Fund v. Edwin M. Greene*, 653 F.2d 972 (5th Cir. 1981), *cert. denied*, 456 U.S. 973 (1982), which was also decided prior to this Court's opinion in *Jim McNeff*. Moreover, *Edwin M. Greene* involved employers held as a *matter of law* to be *separate* and *distinct*. Notwithstanding this finding, the union therein continued to seek extension of its bargaining rights and contract to a nonsignatory employer solely on the basis of certain contract language. It is in this context that Petitioners' quote from *Edwin M. Greene* must be considered. (Pet. Brief, p. 8).

Finally, Petitioners' arguments (at p. 8, n.3 and pp. 10-11 of their Brief) both misconstrue the opinion below and ignore construction industry practices regarding prehire agreements. As to the former, the Court below did not hold (and it is not a consequence of the decision below) that upon a single employer finding all employees of both companies are "*bound* by the collective bargaining agreement". First, employees are not bound to a prehire agreement. They remain unconditionally free to reject it at any time. Rather, *the employer* is required to pay for its past breaches of the contract. Second, *all* employees are not automatically covered by the contract. Rather, as the court below noted, "the contract language itself will determine to whom FI, SFE and CEC owe the pay and benefits specified by the agreement". (App. A, p. 10a). In this case, this means electricians, not Petitioners' estimators, laborers, iron workers or any other craft they may employ.[11]

As to the permissible practices regarding prehire agreements, Petitioners claim that employees will be "bound" to a contract "regardless of whether their interests are sufficiently similar to have been adequately represented by a single union during negotiations" simply ignores the fact that unions and employers can and do

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[11] Petitioners claim that this case presents representational issues "disguised in contractual garb" simply ignores the factual realities regarding the single employer allegations made by the Union. This is not a case like *Edwin M. Greene* or *Ketchikan Pulp* where the Union, under the guise of Section 301, seeks to extend its representational rights *solely* on the basis of certain contract (accretion) language.

enter into prehire agreements at a time when the employer has absolutely no employees in its employ.

On the basis of the foregoing, it is respectfully submitted that the decision below is not in conflict with opinions from other circuits on the same matter and, as a result, the Petition should be denied.

B. The Decision Below Does Not Fundamentally Misconstrue Nor Misapply Decisions from this Court

In their argument that the court below misconstrued this court's opinion in *Jim McNeff*, Petitioners rehash their arguments regarding the necessity of an appropriate unit finding. Thus, Petitioners argue that while *Jim McNeff* resolved the question of whether majority status was necessary to enforce a prehire agreement, the issue presented herein is "preliminary to, and separate from, the question presented in *Jim McNeff*". According to Petitioners that preliminary question is whether Petitioners are bound to the prehire agreement. As to this issue, Petitioners again argue that an appropriate unit finding is a prerequisite to establishing that fact, and that the court below misconstrued *Jim McNeff* when it held otherwise.

However, this argument by Petitioners is circuitous at best and the opinion below did not misconstrue *Jim McNeff*.

Initially, it is difficult to understand why a unit determination is necessary in a case where majority status is not necessary to enforce the prehire contract. Assuming all Petitioners are but a single employer, all are bound to

the contract and the contract's economic terms apply to those employees as defined in that contract.[12]

Bargaining unit determinations are a product of Section 9(b) of the N.L.R.A. That Section requires the Board, in order to protect employees' Section 7 rights, to determine the appropriate unit *for collective bargaining*. In a single employer case before the Board where the union seeks to become the exclusive bargaining representative for the employees of the non-signatory employer and bind those employees to a collective bargaining agreement, an appropriate unit determination is essential to protect the employees' Section 7 rights. In essence, employees should not be grouped with other employees and saddled with an exclusive bargaining representative absent some community of interest among the employees.

As previously noted, however, the Union does not seek to become the exclusive bargaining representative for Petitioners' employees. As the court below correctly noted, "enforcement of the prehire agreement against [all Petitioners] does not implicate the representational desires of any of [Petitioners' employees] who remain free to petition for and to elect an exclusive representative pursuant to Section 9 of the LMRA". (App. A, p. 10a). Since the Union's action herein does not implicate the

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[12] Running throughout Petitioners' arguments is the assumption that all Petitioners are separate employers and that the Union seeks to extend this contract to some "stranger" employer. However, as the court below apparently noted, this is the same error committed by the District Court in its dismissal of the instant action. (App. A, p. 9a).

employees' Section 7 rights, a Section 9 unit determination is not required either to bind Petitioners to this prehire contract or to enforce the contract against them, and this holding by the court below is not inconsistent with this court's opinion in *Jim McNeff*.

Indeed, it seems anomalous for Petitioners to argue that a court, when asked to remedy a breach of contract, cannot do what Petitioners may do themselves, i.e., declare themselves parties to a prehire contract (based upon their own conduct) without any showing of majority support or, for that matter, without even having any employees.

As to Petitioners' argument that the decision below runs contrary to the critical facts and policies of *Jim McNeff*, this argument is based upon Petitioners' erroneous assumption that they are to be treated as separate employers. However, contrary to these assumptions, S.L. Fowler voluntarily created new entities without maintaining the requisite degree of separation necessary to avoid a claim that his companies are one and the same. He attempted to run a union and nonunion shop together, with the nonunion shop feeding off of and draining the resources that the union shop built over a period of twenty years. For Petitioners to seek to distinguish *Jim McNeff* on a claim that McNeff voluntarily executed[13] a

[13] It is interesting to note that Jim McNeff only signed a contract because he was compelled to do so by a general contractor. Furthermore, under the terms of that contract, McNeff's employees were required to and did join the union. It is arguable that Petitioners' conduct herein is more voluntary than that involved in *Jim McNeff*.

contract whereas Petitioners FI, SFE and CEC have executed nothing, is to simply ignore the Union's theory and supporting facts. Equally unpersuasive is Petitioners' claim that FI, SFE and CEC reaped no benefits from the prehire agreement. FEC built a thriving business with the supply of skilled journeymen provided by the Union. When FEC transferred employees, tools, equipment and customers to the other Petitioners, they reaped the benefit of the prehire agreement while FEC was left to wither on the vine.

Petitioners' additionally claim that the decision below misconstrued this Court's decision in *South Prairie Construction Co. v. Local 627*, 425 U.S. 800 (1976). Petitioners build their argument around the claim that "the remedy sought in *South Prairie* is the same as that sought in the case at hand" and therefore, as in *South Prairie*, an appropriate unit finding is required. (Pet. Brief, p. 16). However, as this court recognized in *South Prairie*, the "union contended [that] South Prairie was obligated to recognize the union as the representative of a bargaining unit drawn to include South Prairie's employees". *Id* at 800. As argued before, where a union seeks to become an exclusive bargaining agent, an appropriate unit finding is essential. However, such remedy is not sought herein and the Eleventh Circuit's distinguishing of *South Prairie* on that basis is not a misconstruction of this court's opinion in *South Prairie*.[14]

[14] Petitioners' claim that forum shopping will be a natural consequence of the decision below is simply a misunderstanding of the clearly different remedies available in a Labor Board case and a breach of contract case.

Finally, contrary to Petitioners' claims, *South Prairie* does not hold that an appropriate unit finding must be made in all Section 301 breach of contract cases. Nor does it hold that appropriate unit findings can only be made by the National Labor Relations Board. Rather, *South Prairie* established that it is inappropriate for appellate courts to make *initial* unit determinations in unfair labor practice cases originating with the Board. This is clearly consistent with the standard of review used by courts reviewing Board findings. *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951). However, the *South Prairie* decision did not hold that unit determinations must be made in Section 301 cases involving prehire contracts. Nor does that case suggest that federal courts lack jurisdiction to make unit determinations when they appear in a genuine breach of contract action.

The decision below does not misconstrue any decision from this court and the Writ should be denied.

C. Whether the Board Must Make Initial Unit Determinations Is Not a Question of Exceptional Importance Upon Which Circuit Courts Are in Conflict

In *Connell Construction Company v. Plumbers Local No. 100*, 421 U.S. 616 (1975) and *Kaiser Steel Corp. v. Mullins*, 455 U.S. 71 (1982), the court concluded that federal courts may decide labor law questions that emerge as collateral issues brought under independent federal remedies. Consistent with these holdings, the Fifth Circuit (in *Pratt Farnsworth*) and the Tenth Circuit (in *Trustees Colorado Ironworkers Training Fund v. A & P Steel*, 812 F.2d 1518, 1525 (10th Cir. 1987)), have held that federal courts have

jurisdiction to decide appropriate unit issues which attach to breach of contract claims. *See also, Carpenters Local 1694 v. W.T. Galliher Inc.*, 787 F.2d 953 (4th Cir. 1986).

Contrary to Petitioners' claims, the Ninth Circuit has moved in line with these decisions. Thus, in *Teamsters Local 70 v. Celotex*, 708 F.2d 488, 490 n.3 (9th Cir. 1983), decided after *California Consolidators*, the court, relying upon *Kaiser Steel Corp. v. Mullins*, stated:

> Although primary jurisdiction lies with the NLRB for representation matters . . . primary jurisdiction lies with the district court for breach of collective bargaining agreement claims . . . thus, the NLRB and district courts *share concurrent jurisdiction over cases legitimately involving both types of disputes id* at 490, n.3 (citations omitted) (emphasis added).
>
> *See also, International Union of Operating Engineers, Local 926 v. Superior Rigging & Erecting*, 602 F. Supp. 913, 917 (N.D. Ga. 1984); *Carpenters Local 2247 v. Endicott Enterprises*, 806 F.2d 918 (9th Cir. 1986); *Electrical Workers Local 441 v. K.B.R. Electric*, 812 F.2d 495 (9th Cir. 1987).[15]

Contrary to Petitioners' claims, there is not a conflict among the circuits with regard to the issue of whether federal courts have collateral Jurisdiction to decide labor

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[15] The Ninth Circuit's decision in *Griffith Construction Co. v. United Brotherhood of Carpenters & Joiners of Southern California*, 785 F. 2d 706 (9th Cir. 1986) does not undermine the efficacy of this assertion. Thus, Griffith did not involve an attempt to collect obligations incurred under a prehire agreement but rather involved a question concerning the representational status of the union and the employer's obligation to deal with that union (and its contracts) in the future.

law issues which are presented in genuine breach of contract actions.

CONCLUSION

For the foregoing reasons the Union respectfully submits that the opinion below is in harmony with, and a logical extension of, this Court's prior opinions regarding enforcement of prehire contracts. Similarly, the decision below is not in conflict with the decisions from other circuits on this same matter. Accordingly, the Court should deny this petition.

Respectfully submitted,

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APPENDIX A

Labor Management Relations Act Section 8(a)(5), 29 U.S.C. Section 158(a)(5):

> (a) It shall be an unfair labor practice for an employer –
>
> > (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

Labor Management Relations Act Section 8(f), 29 U.S.C. Section 158(f):

> (f) It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) because (a) the majority status of such labor organization has not been established under the provisions of section 9 of this Act prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such

agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the final proviso to section 8(a)(3) of this Act: *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 9(c) or 9(e).

National Labor Relations Act Section 9(a), 29 U.S.C. Section 159(a):

(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.